Catalytic, Inc. *and* Plumbers and Pipefitters Local Union No. 520. Case 4–CA–15320

January 28, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On August 23, 1988, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions[1] and a supporting brief. The General Counsel and the Charging Party each filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The issue in this proceeding is whether the Board, in the exercise of its discretion, will defer to a contractual grievance settlement prior to arbitration by the employer and the collective-bargaining representative, where that settlement is opposed by the grievant and his local union, which is not the bargaining representative or a party to the contract. The judge refused to defer because the grievant, who was affected by the settlement, and his local union, which was present at the first step of the grievance procedure, refused to accept the settlement. For the reasons set forth below we defer to the settlement and dismiss the complaint.

I. BACKGROUND

A. *The Work Dispute and Berry's Discharge*

The Respondent is an engineering contractor engaged, inter alia, in performing maintenance service for Philadelphia Electric Company (PECO) at the latter's Peach Bottom nuclear generating plant in Delta, Pennsylvania. The Respondent's craft employees at Peach Bottom are covered by the General Presidents' Project Maintenance Agreement (GPA), negotiated on a nationwide basis with 14 International Building Trades Unions, to which the Respondent is signatory. The Charging Party, Plumbers and Pipefitters Local Union 520, supplies employees to employers at the job, but it is not a party to the contract. It is, however, an affiliate of one of the contracting Internationals, the United Association.[2] The United Association is the recognized bargaining representative.

The level of Respondent Catalytic's craft work force fluctuates considerably, as is typical on such a site, depending on the level of work assigned to the Respondent by PECO. The number of craft employees is generally highest during an outage, which is a shutdown of the power generating unit, which occurs either on a planned or an emergency basis. In August 1985, during such an outage, PECO assigned the Respondent a job involving the removal and reinstallation of ''snubbers'' (shock absorbers). PECO retained the repair work on the snubbers, which it then awarded to a different contractor. Local 520's business manager, Hartinger, protested this assignment and told the Respondent that it should tell PECO that the pipefitters should be assigned all the work and, if not, the pipefitters would not do any part of it. On Thursday, August 29, the Respondent informed its pipefitter employees that the snubber removal work would be done in two shifts beginning the following Tuesday, the day after Labor Day. Local 520's steward, Garland Berry, reported this to Local 520 Business Manager Hartinger, who disagreed. Hartinger said he would talk to the Respondent and get back to Berry. In the meantime, Berry and the Respondent's general foreman, Pritchard, together selected which employees would work the morning and afternoon shifts.

Just prior to quitting time on Friday, August 30, Berry, who had again been in touch with Hartinger, countermanded the Respondent's orders in Pritchard's presence. Berry told the men that, contrary to the Respondent's directions, they should all report at their prior, morning-shift time on Tuesday, instead of at the two shifts designated by the Respondent. One of the employees asked Berry whether he should take his directions from Berry or from the Company. Berry told him that he should always take his direction from the local business manager.

Berry's directive to the employees was reported that same day to the Respondent's site manager, McCauley. McCauley, in turn, reported the directive to the Respondent's labor relations representative for the Peach Bottom site, Neil Greeley, in Philadelphia. Greeley called the United Association's International representative for the site, Frank Deluca, that evening but missed him. On Saturday morning, August 31, Greeley talked to Deluca and then had a three-way conversation with Deluca and Hartinger. Deluca agreed that the job was to be manned in accordance with the Respondent's instructions under the GPA, and so directed Hartinger. Deluca, however, also requested a meeting with the Respondent and PECO to discuss PECO's failure to give all the work on repair of the snubbers to the pipefitters. Greeley agreed to arrange the meeting.

Due to schedule conflicts, the meeting was not held at the site until September 12. At the outset of the

[1] The Respondent's request for oral argument is denied, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada.

September 12 meeting, a complaint was raised about an incident concerning intimidation of a welding inspector, that PECO believed involved Berry. The Respondent had learned of the incident that morning from PECO. The remainder of the meeting apparently focused on Berry, without much substantive discussion concerning PECO's work assignments. (Investigation later that day disclosed that Berry was not involved in the welding incident.) The next day, Berry was discharged by the Respondent, which cited as gross insubordination Berry's directive to employees on Friday, August 30, countermanding the Respondent's orders.

B. *The Grievance and the Settlement*

A grievance concerning Berry's discharge was filed the same day as the discharge and was processed through three steps of the GPA's grievance procedure. Step 1 of that procedure is a meeting between the aggrieved employee and/or the ''on-site representative'' and the employee's immediate onsite staff supervisor. It is understood that the onsite representative has permission to phone the office of the administrator of the General Presidents' Project Maintenance Committee for guidance in any situation that may arise. On grievances involving disciplinary action, or disputes relative to local wages and fringe benefits arising under the agreement, a representative of the Local Union is included in the step 1 meeting. Step 2 involves an International union representative, the Local union representative, and the contractor's labor relations manager. At step 3, the information prepared for step 2, plus any other supplemental information, facts, or positions developed in step 2, are submitted in writing to the general presidents' committee.[3] If agreement is not reached at that stage, either party may appeal to an arbitrator.

In this case, in preparation for step 2, International Representative Deluca, Local Business Manager Hartinger, and Berry met in Washington, D.C., with M. E. Moore, assistant general president of the United Association, and his assistant, R. Baynes, and explained the Local's position. Moore called the Respondent's vice president, McIntire, to advise him of the United Association's concern about getting the grievance settled. Approximately a week later, a step 2 meeting was held in Washington. Present were Moore, Deluca, and Baynes for the Union; and Greeley and McIntire for the Respondent. The parties discussed Hartinger's disagreement with PECO's decision to give only the removal and reinstallation work on the snubbers to the Respondent and the United Association's position with respect to Berry's authority at the jobsite. After the grievance was discussed in detail, McIntire suggested that both sides take a few days to digest the grievance and get back in contact by phone. No resolution was reached.

In a January 2, 1986 letter to the administrator of the general presidents' committee, Marvin J. Boede, general president of the United Association, requested that the GPA step 3 grievance concerning Berry's termination be placed on the agenda for the next general presidents' committee meeting, to be held January 10 to 12. The letter ''enclosed . . . copies of the United Association's and also the Company's position,'' and noted that Boede was sending a copy of the letter to the Respondent so that it would be aware of the date of the step 3 meeting. At step 3, both parties to the GPA, the Respondent and the United Association, presented their positions to the committee. In a January 31, 1986 letter, Administrator Owens advised that:

> At the last regular meeting of the General Presidents' Committee a Step III grievance was reviewed involving Garland Berry, Member of UA Local #520, terminated from the Peach Bottom Nuclear Power Plant, Delta, Pennsylvania project.
>
> After hearing statements from both parties and carefully examining all of the evidence submitted, it was the position of the committee that Garland Berry should be made eligible for immediate rehire without any back pay.

Rather than invoking arbitration, both parties to the GPA contract, the Respondent and the bargaining representative, United Association, accepted this result[4] and deemed it final and binding. Although Local 520 was not a party to the contract, its business manager, Hartinger, protested that Berry should be ''reinstated'' rather than rehired, and should receive full compensation for lost wages.

C. *The Judge's Decision*

The judge found that the Respondent had violated Section 8(a)(3) by discharging Berry. The judge rejected the Respondent's argument that the Board should defer to the resolution arrived at through the grievance procedure of the collective-bargaining contract. He concluded that the Board had ''re-emphasized the importance of the requirement that all parties agree to be bound'' in *Alpha Beta Co.*, 273 NLRB 1546,

[3] The general presidents' committee includes a representative of each of the GPA signatory unions.

[4] Under the Respondent's project rules for the Peach Bottom site, the Respondent was not *required* to rehire Berry. The penalty for gross insubordination, the violation with which Berry was charged, is termination ''for the length of the project. Eligibility for rehire will be reviewed on an annual basis.''

The General Counsel argues that it is unclear whether Berry in fact was or would have remained ineligible for rehire for any appreciable length of time based on Berry's testimony that Site Manager McCauley stated at the time of Berry's discharge that McCauley would consider Berry eligible for rehire. However, it is undisputed that the Respondent's official policy at the site is to review eligibility for rehire annually.

1547.[5] He found that as Local 520 disagreed with the settlement, ''all parties did not agree to be bound,'' and that ''all parties did not participate in the grievance procedure's third step.'' On the merits, the judge held that Berry was discharged for his actions as Local 520's steward and that the gross insubordination attributed to him was committed in his capacity as union steward. The judge also observed that, even if the August 30 incident could be considered independently of his steward's duties, Berry's instructions to the employees could not be regarded as gross insubordination because he was merely acting under Hartinger's orders.

II. DISCUSSION

The Respondent excepts both to the judge's failure to defer this matter to the grievance procedure's resolution, and to his decision on the merits.[6] We find merit in the Respondent's exception to the judge's refusal to defer and, therefore, find it unnecessary to pass on the merits.

The United Association (the bargaining representative) and the Respondent have accepted a resolution of Berry's grievance that was arrived at through the mechanism of the bargained-for grievance procedure. Thus, both deemed the general presidents' committee's disposition of the grievance to be final and binding.

The question is whether the agreement of the Employer and the bargaining representative to the general presidents' committee's resolution of the grievance is enough to warrant the Board's deferring to that resolution without the agreement of the affected employee or his local. The answer is found in *Postal Service*, 300 NLRB 196 (1990).

In *Postal Service*, we interpreted our *Alpha Beta* decision, and the Ninth Circuit's affirmance of that decision, as authorizing the Board to apply the deferral principle of *Spielberg*[7] and *Olin*[8] to settlement agreements between the employer and the authorized bargaining representative that were reached during contractual grievance and arbitration proceedings, short of a final and binding arbitration award, even though the employee grievant opposed the settlement. We did so on the theory implicitly approved by the Ninth Circuit in *Alpha Beta*, that the employee's collective-bargaining agent was empowered to bind him, even without his consent.[9]

Here, Local 520, whose Business Agent Hartinger assisted Berry in the presentation of his grievance, is not the collective-bargaining representative. The authorized representative is the United Association, and the United Association is a party to the settlement of the grievance by the GPC to both parties' satisfaction. Thus, Berry's and Local 520's disapproval of the settlement does not defeat the case for deferral under our *Postal Service* holding.[10] In this regard, contrary to our dissenting colleague, we conclude that the parties' mutually satisfactory resolution of the grievance through resort to the agreed-on grievance machinery is tantamount to a settlement agreement such as was involved in *Postal Service*. We further conclude that deferral to such a settlement furthers the purposes and policies of the Act favoring private resolution of labor disputes.[11]

We also find *Spann Building Maintenance Co.*, 289 NLRB 915 (1988), relied on by our dissenting colleague to be inapposite here. In that case the employer made offers to settle employee Lewis' discharge grievance without backpay or seniority. Lewis declined those offers and filed a charge with the Board. About a week later, the company's personnel manager telephoned Lewis about filing the charge and made another offer, which Lewis refused. Finally, the company's personnel manager called Lewis just before issuance of the complaint and offered to reinstate her at a different building from the one where she had previously been employed—without backpay, without the previously offered seniority and vacation pay, and without any mention of settling either the pending NLRB charge or the unresolved grievance. Lewis, who had then been off work for some 6 months, agreed to return to work. The Board found that the Respondent:

[5] 273 NLRB 1546 (1985), petition for review denied sub nom. *Mahon v. NLRB*, 808 F.2d 1342 (9th Cir. 1987).

[6] In this regard, we note that the Respondent argued that the GPC decision was tantamount to an arbitration award and further argued that, if the decision is viewed as a settlement, deferral is appropriate under the standards set forth in *Alpha Beta* and *Olin*, see fn. 8 infra.

[7] *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

[8] *Olin Corp.*, 268 NLRB 573 (1984).

[9] In *Postal Service*, we stated:

> But the Union, as his collective-bargaining agent, was, in the words of the Ninth Circuit's affirmance of *Alpha Beta*, empowered to bind him ''wholly apart from [his] own separate consent.'' Further, we find that McCullough [the grievant and charging party] authorized the Union to settle the dispute when he invoked the contractual grievance procedure. [300 NLRB at 197.]

[10] *Combustion Engineering*, 272 NLRB 215 (1984), cited by the judge, is not to the contrary. In that case, the parties agreed to a settlement regarding employee Richard, which provided that he would be reinstated with no backpay, subject to a 120-day probationary period. The judge in that case declined to defer to the agreement on grounds that he did not know ''the nature, extent, or circumstances pursuant to which such settlements have been made.'' The Board found the judge's analysis unconvincing and reversed. Thus, the Board stated

> The terms of the agreement *suggest* that both Richard and the Respondent made concessions in order to settle the grievance and avoid arbitration. Specifically, Richard agreed to forgo backpay and the Respondent agreed to reinstate him *though not obliged to do so at that time*. [Id. at 217. Emphasis added.]

Although the grievant himself appears to have agreed to the terms of the settlement in that case, that is not a prerequisite, as discussed above, and the Board's decision did not turn on that fact. Here, as in *Combustion Engineering*, both parties to the grievance procedure made concessions and settled the matter. The bargaining representative agreed to forgo backpay on Berry's behalf, and the Respondent agreed to make him eligible for rehire, although not obliged to do so under its project rules for the Peach Bottom site.

[11] Conversely, we do not believe that it is either necessary or appropriate to interject ourselves into the parties' resolution of their grievance to determine if, in our view, sufficient negotiations or discussions occurred to merit deferral. Moreover, contrary to the dissent, we do not believe that the Board precedent relied on there warrants any such determination. Simply put, it is our view that a disposition satisfactory to the parties arrived at through their collectively bargained grievance resolution machinery is sufficient to merit deferral under *Alpha Beta* and *Postal Service*.

> outside the channels of the grievance procedure and without involving the Union, contacted Lewis directly and arranged for her to resume working. This was clearly an effort by the Respondent to limit its potential backpay liability in the event that Lewis prevailed in her unfair labor practice case. This informal arrangement, entered into without the involvement of the Union . . . did not purport to be a settlement of the grievance. [289 NLRB at 916.]

The Board concluded that the fact that Lewis was reinstated ''does not retroactively change the nature of the Respondent's arrangement with Lewis and transform it into a settlement.'' Thus, as the union had made it clear that it would not proceed further in the grievance over Lewis' discharge, and the Board found that the grievance was not settled, the Board found it appropriate to determine the merits of the complaint. But the situation in *Spann* was totally unlike that presented here. Thus, in *Spann* no agreement was reached through the grievance mechanism, and the Respondent's offer to Lewis did not purport to be a settlement or resolution of either the grievance or the unfair labor practice charge. By contrast, in the instant case we are asked to defer to a disposition arrived at through the parties' collectively bargained grievance machinery in a situation in which both parties deem that resolution to be final and binding.[12]

It is, therefore, appropriate to examine the settlement in light of the general deferral principles enunciated in *Alpha Beta*, supra, and in *Olin* and *Spielberg*, supra. Those principles require that the proceedings be fair and regular, that all parties have agreed to be bound, and that the resolution is not clearly repugnant to the purposes and policies of the Act.[13] The first deferral criterion is satisfied here because there is no evidence that the grievance proceedings were anything but fair and regular. The parties' settlement satisfies the second criterion that all parties had agreed to be bound, as discussed above.[14]

We further find that the settlement in this case is not ''clearly repugnant'' to the purposes and policies of the Act. In *Olin*, supra, the Board stated it would not require an arbitrator's award to be totally consistent with Board precedent. Rather, the Board will not find an award to be ''clearly repugnant'' unless it is ''palpably wrong.''[15] In this case, the fact that Berry may not have received all the relief to which he (or Hartinger) believed that he was entitled does not render the settlement ''palpably wrong.''[16] Indeed, we find no indication that the resolution of the grievance is repugnant to the Act. Rather, the parties' settlement involved a compromise, with both sides making concessions and with Berry being made eligible for immediate rehire.

Finally, we conclude that the last deferral criterion referred to in *Olin* has been met in this case. The Board in *Olin* held that the unfair labor practice issue must have been considered by the arbitrator, and that this criterion is met when the contractual issue is factually parallel to the unfair labor practice issue and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. *Olin*, supra, 268 NLRB at 574, and cases cited there. Further, the Board held that the party seeking to defeat deferral bears the burden of showing that the *Olin* standards have not been met. Where, as here, a settlement is reached prior to arbitration, the criterion is satisfied when the contractual issue and the unfair labor practice issue are factually parallel, and the parties were generally aware of the facts relevant to resolving the unfair labor practice issue. Here, the record shows that these aspects have been met, and the General Counsel has not raised a genuine issue with respect to the *Olin* standards.

III. CONCLUSION

We shall defer to the settlement arrived at by the parties through the mechanism of their grievance procedure and dismiss the complaint.

ORDER

The complaint is dismissed.

MEMBER CRACRAFT, dissenting.

Contrary to my colleagues, I find that the instant case does not involve a grievance settlement, but merely a union's decision not to appeal a grievance to arbitration. Accordingly, I find *Postal Service*, 300 NLRB 196 (1990), and *Alpha Beta*, 273 NLRB 1546 (1985), affd. sub nom. *Mahon v. NLRB*, 808 F.2d 1342 (9th Cir. 1987), dealing with deferral to negotiated grievance settlements, to be inapplicable.

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (the International) is signatory to the general presidents' Project Maintenance Agreement, the relevant collective-bargaining agreement. The Charging Party, Plumbers and Pipefitters Local

[12] Accord: *Postal Service*, supra.

[13] The Board in *Raytheon Co.*, 140 NLRB 883 (1963), further conditioned deferral on an arbitrator's having considered the unfair labor practice issue.

[14] We note that both Berry and Hartinger, like the grievant in *Postal Service*, supra, were familiar with the operation of the grievance and arbitration procedure. See *Postal Service*, supra at 197 fn. 11. And see *Energy Cooperative, Inc.*, 290 NLRB 635 (1988), where the Board gave effect to a strike settlement agreement between the union and the respondent employer, over objections of the individual charging party. The Board there noted the language of the Ninth Circuit, in affirming *Alpha Beta*, that ''a union is empowered to bind employees it represents wholly apart from their separate consent.'' Id. at 637 fn. 16.

[15] 268 NLRB at 574.

[16] See *Independent Stave Co.*, 287 NLRB 740, 743 (1987); *Postal Service*, supra at 198 fn. 13.

Union No. 520 (the local union), while affiliated with the International, is not a party to this agreement. The grievance procedure in that agreement consisted of four steps.[1]

Garland Berry, a member of the local union, was the steward for Local 520. Berry was informed that he was discharged by the Respondent on September 13, 1985. The local union filed a grievance concerning the discharge with the International on Berry's behalf. The grievance remained unresolved through the second step. The International then took the grievance to step 3 by submitting it to the general presidents' committee (GPC).[2] The GPC found the following:

> After hearing statements from both parties and carefully examining all of the evidence submitted, it was the position of the committee that Garland Berry should be made eligible for immediate rehire without any back pay.

Subsequent to that decision, the local union, which is not directly involved in the grievance procedure, urged the International to take the case to step 4, arbitration. The International refused, taking the position that the only time a case goes to arbitration is when the GPC cannot agree to a solution. The International stated that the ''U.A. has taken them to the highest step in the grievance procedure and will consider this case closed.''

My colleagues term the parties' decision not to pursue the Berry grievance to arbitration a ''settlement.'' My colleagues then apply the principles of *Postal Service* and *Alpha Beta* to this so-called settlement and conclude that the General Counsel has not satisfied his burden of showing that deferral is not warranted. Accordingly, they dismiss the complaint.

I cannot join my colleagues' decision because I disagree with their basic premise. Simply stated, there was no grievance settlement in this case. Certainly, as the Respondent argues in its brief, the GPC decision did not constitute a negotiated settlement of Berry's grievance.[3] There were no direct discussions between the Respondent and the International. Rather, the Respondent and the International presented their respective positions to a third party, the GPC, which issued a decision. The mere fact that that decision became final when the International decided not to invoke step 4 of the grievance procedure does not transform the resolution of the grievance into a ''settlement.''

The facts of *Postal Service* and *Alpha Beta* are entirely different. In those cases, direct employer-union discussions were held, both sides made concessions, and agreements were reached. The Board found that the grievances were settled and concluded that deferral was warranted under the standards set forth in *Olin Corp*., 268 NLRB 573 (1984). The Board did not state or even suggest in *Postal Service* or *Alpha Beta* that every resolution of a dispute in the context of the grievance procedure would constitute a ''settlement'' worthy of Board deference.

On the contrary, in the seminal case of *Alpha Beta* the Board twice emphasized the importance of the parties' having resolved their differences through the negotiation process. First, the Board quoted with approval the view of former Member Penello, as follows:

> Deferral in general will encourage parties . . . *to negotiate* rather than to litigate *their differences*.
>
> The Board should encourage employers and unions *to negotiate their differences* arising during the term of their bargaining agreement, *to discuss and settle grievances*, and, if necessary, to arbitrate their differences. [273 NLRB at 1547. Emphasis added.]

Second, in finding that the disposition of the grievances was not ''palpably wrong'' under the law, the Board relied on the fact that there had been ''*negotiations* between the Respondents and the Unions.'' 273 NLRB at 1547 (emphasis added).

In the instant case, on the other hand, it bears repeating that resolution of the Berry grievance was not the result of negotiations or discussions between the parties. What occurred here was nothing more than a decision by the International not to pursue the grievance to arbitration. In my view, deferral in such circumstances is not appropriate.

When labor and management negotiate a grievance settlement, the merits of their respective positions will likely have a major bearing on the outcome. However, when a union merely decides not to appeal a grievance to arbitration, the union's view of the merits may have little to do with its decision. For example, in *Spann Building Maintenance Co.*,[4] the union had a general

[1] The first step requires a grievance to be discussed by the employee or his onsite representative and the supervisor involved. If it is not resolved at that stage, it is discussed between an International union representative and Catalytic's labor relations manager. If still not resolved, it then proceeds to step 3 and is submitted in writing to the general presidents' committee (GPC), a body of 14 or 15 craft union presidents who are signatory to the presidents' agreement. Both Catalytic and the International make presentations to the GPC. The GPC then issues a recommended decision that is reviewed by Catalytic and the International. If either party is dissatisfied, it can proceed to step 4, arbitration. If the matter is not submitted to arbitration, the record indicates that the recommended decision of the GPC becomes final and binding on the International and Catalytic.

[2] The International representative made a brief oral presentation before the committee and requested that Berry be reinstated with backpay. Catalytic's labor relations manager made an oral presentation and submitted a written report.

[3] In its exceptions, the Respondent's primary contention is that the GPC decision is similar to an arbitration award and should be deferred to under the principles set forth in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). I disagree. Where, as here, the parties' own procedure provides for arbitration but the grievance is not processed to that final step, I find *Spielberg* inapplicable. See *Whirlpool Corp*., 216 NLRB 183, 186 (1975).

[4] 275 NLRB 971 (1985), remanded sub nom. *Lewis v. NLRB*, 800 F.2d 818 (8th Cir. 1986), supplemental decision 284 NLRB 470 (1987), second supplemental decision 289 NLRB 915 (1988).

policy of not arbitrating a discharge grievance if the company had offered reinstatement. In the instant case, the International's policy was not to appeal a grievance to arbitration if the GPC could agree on a solution. In another case, a union may not be able to afford the cost of arbitration. The Board should not dismiss an employee's statutory claim in deference to a private dispute resolution mechanism where there is a substantial likelihood that the party representing the employee's interests declines to proceed with the employee's claim on a basis that gives little or no consideration to the merits.

My colleagues do not cite a single case in which the Board considered a decision not to seek arbitration to be a ''settlement,'' and I know of none. To the contrary, in *Spann Building Maintenance*, supra, the Board found that a union's decision not to pursue a grievance was not equivalent to a settlement. Briefly, the facts in that case were that the union filed a grievance over an employee's discharge and discussed resolution of the grievance with the company without success. After the employee filed an unfair labor practice charge, the company contacted the employee directly and offered reinstatement to a different work location with no mention of the offer being in settlement of the grievance. The employee accepted this offer. Thereafter, the union refused to pursue the employee's grievance to arbitration on the ground that it ''consider[ed] the matter as settled based on the fact that [the employee] was reinstated to employment.'' 289 NLRB 915, supra. Based on the union's position and citing *Alpha Beta*, the company urged the Board to defer to ''the settlement agreement'' between the company and the union. The Board found deferral inappropriate, distinguishing *Alpha Beta* on the ground that in *Spann* there had been no settlement of the grievance.[5]

Here, as in *Spann*, the parties did not negotiate a mutually satisfactory resolution of the grievance. And here, as in *Spann*, the decision not to appeal the grievance to arbitration does not constitute a ''settlement.'' In fact, this case is even weaker than *Spann* for finding a settlement because no party before the Board even argues as its primary position that the Berry grievance was settled.[6]

In *Alpha Beta*, the Board reiterated what it had stated earlier in *Olin*: this Agency is committed to a policy of deferral ''where appropriate safeguards for statutory rights are satisfied.'' 273 NLRB 1547. One of those safeguards, implicit in *Alpha Beta*, is that the employee's bargaining representative negotiate the settlement to which the Board is deferring. Believing as I do in the importance of that safeguard, I must dissent from my colleagues' decision to defer to a nonexistent ''settlement.'' I would instead affirm the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Berry because of his activities as a union steward.

[5] *Combustion Engineering*, 272 NLRB 215 (1984), is distinguishable on the same basis. In that case the Board deferred to a negotiated settlement in which both the employer and employee made concessions.

[6] The judge found that there had been a grievance ''settlement,'' and the Respondent excepted to that finding. The Respondent's position is summarized in fn. 3, supra. The General Counsel's view is that the grievance was ''dropped.'' The Charging Party argues that ''[n]either Local 520 nor Mr. Berry was even involved in the settlement process, if that is a proper description for what went on before the GPC.''

Margaret M. McGovern, Esq., for the General Counsel.
Francis M. Milone, Esq. (Morgan, Lewis & Bockius), of Philadelphia, Pennsylvania, for the Respondent.
James L. Cowden, Esq. (Handler, Gerber, Johnson, & Strokoff), of Harrisburg, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case arose on a charge filed on September 18, 1985, by Plumbers and Pipefitters Local Union No. 520 and a complaint issued by the General Counsel of the National Labor Relations Board on January 30, 1987, against Catalytic, Inc. The complaint alleges that the Respondent, Catalytic, Inc., violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by discharging its employee, Garland Berry. The Respondent's answer admits the jurisdictional allegations of the complaint, the status of Neal Greeley and Lou McCullough as supervisors, and the discharge of the employees, but it denies the allegations of unfair labor practices and, as an affirmative defense, submits that the Board should defer to the resolution of the grievance procedure.

The case was tried before me on April 20 and May 1, 1987, in Harrisburg, Pennsylvania, where all parties were given an opportunity to introduce relevant evidence, to examine and cross-examine witnesses, and to make oral argument. Briefs were filed by the General Counsel, the Charging Party, and the Respondent on June 5, 1987. Based on the whole record[1] in this case and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

Catalytic, Inc. is a Pennsylvania corporation with its main office located in Philadelphia, Pennsylvania, from where it conducts its business of general construction. It is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union, Plumbers and Pipefitters Local Union No. 520, is a labor organization within the meaning of Section 2(5) of the Act.

The Issues

At issue is whether deferral to the contractual grievance procedure is justified and, if not, whether the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Garland Berry.

[1] Respondent's motion to reopen the hearing is denied.

The Facts

Catalytic, as an engineering contractor, was performing maintenance work on a nuclear generating plant for the Philadelphia Electric Company (PECO) at its Peach Bottom site. The Respondent employed approximately 25 to 30 plumbers and pipefitters at that site to provide the necessary maintenance when the plant was operating. During outages the number of employees usually increased anywhere from 150 to 300. These employees were members of Local 520 which is affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (the International). The International is 1 of 14 International building trades unions which are signatories to a collective-bargaining agreement, known as the General Presidents' Project Maintenance Agreement (Presidents' Agreement) (R. Exh. 2). This document in article VII provides for a grievance and arbitration procedure consisting of four steps, the last of which is arbitration.

Garland Berry was a member of Local 520 and had been employed by the Respondent as a pipefitter since 1979. Since April 1, 1984, he was the steward at the Peach Bottom site for Local 520. During the summer of 1985 PECO assigned to Catalytic the work to remove and to reinstall snubbers, devices designed to operate as shock absorbers in a nuclear reactor. The repair work was awarded by PECO to another contractor over the objections and complaints of Local 520.

In August, Catalytic informed Berry and the eight-man crew of pipefitters who had been working the day shift that it would be split into two shifts, four on the day shift and four on the second shift. Catalytic's foreman, Ike Pritchard, also told Berry that the split shift would go into effect on Tuesday following Labor Day. Berry promptly informed August Hartinger, the business agent for Local 520, of that decision. Hartinger was opposed to the splitting of the crew and called Lou McCauley, the project manager, and Neal Greeley, the labor relations manager, and informed them that he opposed management's decision to split the crew. Hartinger, unable to resolve the matter on Friday, instructed Berry to have the eight-man crew report for work at their normal starting time on Tuesday. In the presence of Foreman Pritchard, Berry instructed the men to report for the day shift on Tuesday which in effect disregarded management's earlier instructions. Greeley reported the disagreement to the International's representative Frank DeLuca on the following day. DeLuca agreed to comply with managment's decision to have four men report for the first shift and four in the afternoon for the second shift. Greely, DeLuca, and Hartinger discussed the problem again in a telephone conversation on Saturday afternoon and also agreed to a meeting to discuss grievances and PECO's refusal to assign more work to the pipefitters. Following these discussions, the crew reported for work as agreed on a split-shift basis. On Thursday, September 12, the parties met. Present were Neal Greeley and Lou McCauley representing Catalytic and Frank DeLuca and Gus Hartinger for the Union. Garland Berry attempted to attend the meeting but was excluded by Catalytic's representatives. Greeley immediately informed the Union that the Company wanted Berry dismissed and that Berry would be discharged on the ground that he had made threats to a welding inspector. Greeley stated that ''they were having problems with Garland as the steward, that he had his nose into company business they didn't feel that he should be involved in, that even PECO was having a hard time accepting him as a steward, that they wanted him dismissed, they didn't want him on the project any more, he was too much of a trouble maker.'' (Tr. 24.) Hartinger, after consulting with Berry outside the meeting room, denied that he had made any threats to a welding inspector. Hugh McNally, a supervisor with PECO, was called in and confirmed his belief that Berry had made such threats. Nevertheless, DeLuca and Hartinger insisted that Berry was not the one who had intimidated the inspector and resisted any attempts to take adverse action against him. The meeting ended with a discussion of PECO's dissatisfaction with Local 520 and the Respondent's agreement to investigate the threat incident before taking any action. On the following day, after Berry had returned to work, he was informed by McCauley that he was discharged. Berry testified as follows about that conversation (Tr. 118):

> After he took me out of earshot from everybody, he told me that, Garland, I guess you gathered that the way that meeting went, the way they were really gunning for you, we had to discharge you. We're going to get rid of you.
>
> He said there was a meeting in downtown Philadelphia and Garland had to go. And he was instructed to discharge me. At that point in time, I asked him what the charge was.
>
> He said gross insubordination. And I said, Lou, what is your definition of gross insubordination. He said, Garland, simply for getting into Catalytic's business.
>
> And I asked him if I were eligible for rehire. He said, as far as I'm concerned, I don't have any problem with hiring you, Garland. That's what he told me.

McCauley also called Hartinger informing him that Berry was dismissed for ''gross insubordination.'' As recalled by Hartinger, McCauley said as follows (Tr. 28):

> [T]hey weren't firing Garland for the welding inspector thing, they were firing him for gross insubordination. . . . [T]hey weren't pleased with the way he told the four men that I had told not to come in on the Tuesday after Labor Day, they were very displeased that he would go out and tell people something like that; therefore they were going to dismiss him.
>
> They figured that was gross insubordination.

The Union filed a grievance under the Presidents' Agreement on behalf of Berry with the International. Under that procedure the Local, which is not directly involved in the grievance process, sent a telegram to the president of the International. Several days after the discharge, Berry, accompanied by Hartinger and DeLuca, met with the two representatives of the International in Washington, D.C., Ed Moore and R. W. Baynes, assistants to the president. Moore attempted to but could not resolve the matter with David McIntire, the Respondent's vice president for labor relations. A second meeting took place a week later between McIntire and Greeley for the Company and Moore and DeLuca for the Union. Again the dispute remained unresolved, although DeLuca testified that it had been his impression after the meeting that Berry would be reinstated. However, because charges had been filed before the Board, both sides assumed

that the matter was out of their hands and they failed to resolve the issue.

The International took the grievance to the third step by submitting it to the General Presidents' Committee, a body of 14 or 15 craft union presidents who are signatories to the Presidents' Agreement. Frank Coyne, the representative of the United Association to that committee, presented the grievance to the committee on behalf of the Union, and the Respondent's position was presented by Greeley. The record shows that Greeley also submitted a written report, but the record is not clear how extensive a written report was presented on behalf of the Union. (R. Exhs. 1, 8; Tr. 305–307.) However, Coyne, who unlike Greely had not been involved in the prior negotiations, was briefed orally by DeLuca and in writing by Assistant President Baynes. The Presidents' Committee did not meet until January 15, 1986. Coyne made a brief oral presentation before the committee and requested that Berry be reinstated with backpay. Greeley made an oral presentation and turned over a written report on behalf of the Employer (R. Exh. 11). The decision of the committee, contained in a letter, dated January 21, 1986, to Catalytic, was (G.C. Exh. 3):

> After hearing statements from both parties and carefully examining all of the evidence submitted, it was the position of the committee that Garland Berry should be made eligible for immediate rehire without any back pay.

In a letter dated February 11, 1986, Hartinger urged the International to take the case to arbitration stating, inter alia (G.C. Exh. 9):

> I would appreciate your views on this matter for I felt then, and I still do, that Garland was dismissed for trying to enforce the G.P.H. on behalf of the United Association. Therefore, I still feel that Garland should be reinstated, not rehired, and should receive full compensation for lost wages he is entitled to.

Hartinger received a response, dated March 6, 1986, in which Ed Moore, assistant general president of the International, informed the Local that:

> [A] hearing was held and it was agreed that Mr. Berry would be rehired but not entitled to back pay. Because of the agreement of the General Presidents' Committee, there is no further step as far as arbitration. The only time it goes to arbitration is when the committee cannot agree to a solution. [R. Exh. 9.]

Berry was rehired in April 1987.

Because McCauley had told Berry and Hartinger already in October 1985 that Berry was eligible for rehire, and because other employees who are discharged for cause are subsequently eligible to be rehired, Local 520 and the General Counsel view the decision of the Presidents' Committee as meaningless. Moreover, the General Counsel and the Charging Party submit that Berry ''was discharged in retaliation for his activities as steward,'' and that the given reason for his discharge, namely, insubordination, was a pretext. According to the Respondent, the discharge was not related to Berry's activities as a union steward.

Analysis

Garland Berry had been a satisfactory employee at Catalytic since 1979 at the Peach Bottom site. He had no record of disciplinary problems; to the contrary, he had been considered by management for a supervisory position. However, in his role as a shop steward since 1984 he was perceived by management to cause problems for Catalytic and its relationship with PECO. According to Berry's testimony, three incidents occurred which demonstrated Catalytic's frustration and hostility toward him as a steward.[2] In May or June 1985, Berry met Michael McMahon, a maintenance supervisor, in the hall as he came out of another supervisor's office. ''He threw his hands up in the air and said, I quit, I give up, you're the only [son-of-a-bitch] that I can't win anything from on site'' (Tr. 105). Right after that encounter with McMahon, Berry was called into the office of John Booth, a construction supervisor and, according to Berry, ''he sat me down to his left, and he—began to tell me that he was very disenchanted with some of the derogatory remarks he had heard that I had been making around the site, suggested that I watch my mouth.'' Booth also informed him ''that he didn't particularly like the way I did business on the telephone [and] . . . that he wasn't too happy with my selection as the union steward'' (Tr. 106). Booth then turned to another supervisor in the office and, in the presence of Berry, said, ''I want to know where this son-of-a-bitch is every minute of every hour of every day on this site, and I want a job assignment in front of him at all times'' (Tr. 106). Berry had a similar conversation with Lou McCauley, the site manager. Berry testified that after McCauley learned of the decision of the Local not to split the work crew, he got angry and said that he ''never had so damn many grievances'' in his entire tenure than he had since Berry became the steward (Tr. 107).

The Respondent argues that these statements, even if made, do not reflect union animus and had no reasonable connection with the discharge, as none of these supervisors were involved in the discharge. The General Counsel, however, states, and I agree, that the Respondent was frustrated with what it perceived was the inflexibility and obstinance of Local 520 regarding changes in assignments. Even though the Respondent knew that Berry was merely following the orders of Hartinger, the only way to retaliate against the Local was through Berry. Catalytic, the subcontractor to PECO, was repeatedly informed of PECO's dissatisfaction with the performance of the pipefitters. For example, Greeley testified about his conversation with DeLuca about Berry's refusal to staff the staggered shift (Tr. 169):

> And again I reviewed for Mr. Deluca the situation and the history with 520 as far as their activities which had taken place in March; basically their interjecting into our management decisions, which we were in the outage, basically we were being viewed by Philadelphia Electric as being a—not controlling the situation.

The Respondent also refers in its brief repeatedly to ''PECO's dissatisfaction with the pipefitters'' and explains

[2] With the exception of the incident involving Supervisor McMahon, the two other incidents are not contradicted. McMahon's testimony impressed me as too equivocal to be convincing. I therefore credit Berry's version of the incident.

that ''PECO's dissatisfaction with the pipefitters stemmed from an incident in the spring of 1985 in which Local 520 had refused to man an emergency water service job at Peach Bottom because it was protesting Catalytic's implementation of a staggered work week'' (R. Br. 5, 8, 9). In an interoffice memorandum, dated October 16, 1985, Greeley gave his version of the scenario leading to the Berry discharge, stating, inter alia (R. Exh. 11):

> Lou advised Mr. Hartinger that the PECO maintenance division felt uncomfortable with the pipefitters attitude and performance because of the March incident and wanted the majority of the work to be completed by in-house maintenance forces.

That memorandum also blamed Berry for a March incident involving disagreement over ''a staggered work week'' causing considerable revenue loss to PECO.

It is abundantly clear that Catalytic was frustrated with Local 520 generally and displeased with its decision to oppose the splitting of the shift. However, this was not the initial reason given by the Respondent for Berry's discharge. At the September 12 meeting with DeLuca and Hartinger, Greeley announced the decision to fire Berry because of threats made to a welding inspector. This reason, however, was substituted by another after the Respondent discovered that Berry was not the one who had made such threats. Indeed, that reason was also inconsistent with Greeley's written memorandum explaining the discharge (R. Exh. 11). Greeley stated there that ''Catalytic will not have Mr. Berry becoming involved in management decisions and as a result of his actions [discussed] Catalytic's intentions of dismissing Mr. Berry'' (R. Exh. 11). Whether or not the Respondent had indicated prior to the September 12 meeting that Berry would be discharged, it is certainly clear from Hartinger's testimony that Berry had long been considered by Catalytic's management as a steward who ''had his nose into company business'' and by PECO as ''too much of a troublemaker'' whom they wanted dismissed (Tr. 24). After both sides had agreed during their meeting on September 12 to have the crew report for the split shift as requested by management, and after management had determined that its basis for Berry's discharge, namely, the threat to the welding inspector, was unfounded, it nevertheless discharged Berry on the following day, Friday, September 13, ''for gross insubordination for directing a work stoppage'' (R. Exh. 11). This, of course, referred to Berry's actions on Friday, August 30, when he relayed Hartinger's order to the pipefitters that they were to report as usual on Tuesday, September 3 at 7:30 a.m., rather than comply with management's request for the split shift. Greeley and other management officials of the Respondent were aware that Berry had not initiated this action, and that he had followed the instructions of his manager, Hartinger. All this suggests a basic insincerity involved in the Respondent's conduct and its handling of the discharge, and gives credence to the General Counsel's argument that the Respondent sought to discharge Berry not for misconduct on his part, but because he was Hartinger's spokesman on the site and because of Respondent's and PECO's dissatisfaction with Local 520 and its resistence to changes in assignments.

The Respondent argues strenuously that ''*there is simply no reasonable basis in the record for infering that Catalytic had any basis for being upset with Berry because of his activities as a union steward*'' and the ''evidence in the record simply will not support the conclusion that Mr. Berry's activities as a union steward were a 'substantial and motivating factor' in his discharge,'' even considering the statements made by several supervisors, because they were not directly involved in the decision to terminate him (R. Br. 29, 35). Yet it is clear that the ''gross insubordination'' attributed by the Respondent to Berry was committed in his capacity as a union steward. Moreover, the record is replete with evidence that Catalytic and PECO were generally critical of Berry as a steward and wanted him out. This is evident not only from the remarks made by the three supervisors of Catalytic but also from the general tenor of the evidence. Greeley testified at length about PECO's dissatisfaction with the pipefitters generally and PECO's desire to have Berry terminated. Since PECO stood to lose money during an outage, the pressure increased on Catalytic to help remedy the situation. In Catalytic's opinion Local 520 had been ''interjecting into our management decisions.'' In PECO's opinion, Catalytic was ''not controlling the situation,'' they ''were in a very difficult situation'' where ''the client sits in our offices . . . watching the situation,'' where the contract with PECO was to expire in 3 or 4 months, and where PECO ''wondered who was running the job'' (Tr. 169–170). Considering these circumstances and also aware that PECO wanted Catalytic to discharge Berry, Catalytic complied.

I disagree with the argument of the Respondent that the discharge of Berry was unrelated to his activities as a union steward. Moreover, the fact that the Respondent based the discharge on an unfounded and erroneous reason and then changed the basis of the discharge to the directive which had been resolved at the meeting of September 12, shows that the Respondent had decided to terminate Berry and was searching for a more suitable reason. Considering the Respondent's shifting reasons for the discharge, the comments by several supervisors, the admitted dissatisfaction of PECO with the pipefitters, the conclusion is compelling that Berry was discharged because of his activity as a union steward. I do not view the ''insubordination'' incident as separate and distinct from Berry's performance as a steward and, accordingly, do not find a dual motive for the discharge. Compare *Wright Line*, 251 NLRB 1083 (1980). However, assuming arguendo that this incident should be considered independently, I cannot find that Berry's instructions to his crew could be regarded as gross insubordination, because he merely acted as the messenger of Hartinger's orders. But even if it could be construed to amount to insubordination, the evidence is clear that it was a pretext. This is clear from the Respondent's conduct in seizing initially upon another, unfounded incident as a reason. Moreover, the instructions to the crew were subsequently countermanded in accordance with the Respondent's wishes and the matter had become a moot issue. Without the Respondent's union animus and Berry's activities as a steward, it is clear that Catalytic would not have discharged Berry as a result of the Labor Day incident.

The more difficult issue in this case is the Respondent's argument that the Board should have deferred the matter to the grievance procedure of the collective-bargaining contract. Generally, the Board finds deferral appropriate where a grievance procedure is available to the parties to resolve their dispute. *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955); *Dubo*

Mfg. Corp., 142 NLRB 431 (1963); *Collyer Insulated Wire*, 192 NLRB 837 (1971). The basic criteria to be applied in determining whether deferral is appropriate are that all parties agreed to be bound, that the proceedings were fair and regular, and that the decision of the arbitration was not repugnant to the Act. *Spielberg Mfg. Co*., supra. In *Olin Corp*., 268 NLRB 573 (1984), the Board further explained that the contractual and statutory issues should be factually parallel. The Board will not only defer under such circumstances to an arbitrator's award, but also to a prearbitration settlement. *Combustion Engineering*, 272 NLRB 215 (1984). The record here shows that the grievance procedure consisted of four steps. The parties stopped short of the last step, namely, arbitration, and arrived at a settlement decision in step three by the General Presidents' Committee. Its decision was stated in a letter dated January 31, 1986, by Thomas Owens, administrator (G.C. Exh. 3):

> At the last regular meeting of the Presidents' Committee, a Step III grievance was reviewed involving Garland Berry, member of UA Local 520 terminated from the Peach Bottom Nuclear Power Plant, Delta, Pennsylvania project.
>
> After hearing statements from both parties and carefully examining all of the evidence submitted, it was the position of the committee that Garland Berry should be made eligible for immediate rehire without any back pay.

The decision was accepted by Catalytic and the International. However, Hartinger representing Local 520, requested the International by letter dated February 11, 1986, to take the matter to arbitration. (G.C. Exh. 4.) He, inter alia, stated: ''I still feel that Garland should be reinstated, not rehired, and should receive full compensation for lost wages he is entitled to. . . . [Y]ou told Catalytic that the U.A. would take this case the whole way to arbitration and I find this is necessary.'' On March 6, 1986, the assistant general president of the International wrote to Hartinger: ''Because of the agreement of the General Presidents' Committee, there is no further step as far as arbitration. The only time it goes to arbitration is when the committee cannot agree to a solution. . . . [T]he U.A. has taken them to the highest step in the grievance procedure and will consider this case closed.'' (R. Exh. 9.)

The Respondent naturally submits that the *Olin Corp*. standards were met and that deferral is appropriate. The General Counsel argues that ''the relationship here is actually three sided, involving Respondent the International Union and the Local Union'' (G.C. Br. 14). The Charging Party would add the individual, Garland Berry. Moreover, according to the General Counsel, ''the record reflects a certain tension among these parties . . . [whose] interests are not wholly aligned.'' Because the Local and the individual had no direct role at all in the process of the grievance at step III, it is the General Counsel's position that deferral is inappropriate. The Charging Party and the General Counsel also argue that the decision to rehire without backpay is meaningless because any employee, even afer discharge for cause, could be rehired. Berry was rehired after several months and did not receive any backpay. Although the Charging Party further argues that none of the *Spielberg* and *Olin* standards were met in this case, clearly the most troubling issue is that Local 520 and Berry, as an individual did not participate directly in the settlement, nor did they fully accept its decision. In *United Technologies Corp*., 268 NLRB 557, 560 (1984), the Board stated, inter alia, as a guiding principle that ''it has refused to defer where the interests of the union which might be expected to represent the employee filing the unfair labor practice charge are adverse to those of the employee.'' To be sure, the interests of the International here were not necessarily adverse to those of Berry, but it is plausible to conclude that the interests of the International were not wholly congruent with those of Berry and Local 520, and that the International attempted to settle a larger controversy, i.e., Catalytic's and PECO's overall dissatisfaction with the pipefitters. Berry's interests may have been sacrificed to achieve the larger goal. In *Combustion Engineering*, 272 NLRB 215, 217 (1984), the Board recognized the importance of the individual's involvement in the settlement agreement and the parties' respective concessions in arriving at a settlement. Here, of course, Berry was not involved in the settlement process, nor did the Respondent make any concessions. To the contrary, the Respondent's position was accepted in spite of the objections of Local 520. In a recent case, *Alpha Beta Co*., 273 NLRB 1546, 1547 (1985),[3] the Board reemphasized the importance of the requirement that all parties agreed to be bound. The Board there observed:

> All parties had agreed to be bound, including the employees. Although the employees were not themselves involved in the settlement negotiations, they were fully informed as to the specific terms of the proposed settlement by the Unions. Indeed, the Unions left the final decision of acceptance or rejection of the proposed settlement up to the employees, who knew that it did not contain any provision of backpay. Instead of rejecting the settlement on that basis, and without expressing any dissatisfaction to the Respondents, the employees authorized the Unions to accept the settlement agreement on their behalf. Thus, the employees were bound by their acts and those of their collective-bargaining representative.

The record here shows clearly that Local 520, which represented Berry's interests, disagreed with the settlement as shown in its letter, dated February 4, 1986, to the International requesting that the matter be taken to arbitration. In sum, the record here shows that all parties did not agree to be bound and that all parties did not participate in the grievance process' third step. Accordingly, I agree with the General Counsel and the Charging Party that deferral is not appropriate under these circumstances.

CONCLUSIONS OF LAW

1. Catalytic, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Plumbers and Pipefitters Local Union No. 520 is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Garland Berry because of his activities as a union steward, the Respondent has violated Section 8(a)(3) and (1) of the Act.

[3] See also *Thatcher Glass Mfg. Co*., 265 NLRB 321 (1982).

4. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Upon concluding that the Respondent has engaged in certain unfair labor practices, I find it necessary to recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having unlawfully discharged Garland Berry, the Respondent shall offer him reinstatement, and make him whole for lost earnings and other benefits computed on a quarterly basis from the date of discharge to the date of a proper offer of reinstatement, less net interim earnings in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[4]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Catalytic, Inc., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging any employee because he engaged in union activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Garland Berry immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed and make him whole for any loss of earnings and other benefits he may have suffered as a result of the discrimination practiced against him in the manner set forth in the remedy section of this decision.

(b) Remove from its files any references to the discharge of Garland Berry and notify him in writing that this has been done and that evidence of his discharge will not be used as a basis for future personnel action against him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at the Respondent's place of business in Philadelphia, Pennsylvania, copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] Under *New Horizons for the Retarded*, supra, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees for engaging in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Garland Berry immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his former seniority or any rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from the discharge, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the discharge of Garland Berry. WE WILL notify him that this has been done and that evidence of his unlawful discharge will not be used in any way as a basis for future personnel action against him.

CATALYTIC, INC.